IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TABORA

AT TABORA

DC CIVIL APPEAL NO. 2 OF 2022

(Arising from Civil Case No.05 of 2020 in the District Court of Tabora at Tabora)

LETSHEGO TANZANIA LIMITED .....APPELLANT

VERSUS

NASSORO HAMIS KIYUNGI.....RESPONDENT

JUDGMENT

Date of Last Order: 07/09/2023
Date of Judgment: 16/11/2023

MATUMA, J.

In the District Court of Tabora at Tabora, the Respondent sued the Appellant for payment of Tshs. 31,000,000/= as special damages, Tshs. 35,000,000/= as general damages, costs of the suit and interests at 25% from the date of filing the suit to the date of judgment and 12% from the date of judgment to the date of full payment.

The historical background to the claims is that the Respondent secured a loan of Tshs. 600,000/= from the Appellant to be repaid at a monthly installment of Tshs. 71,600/= for one year. The loan was to be repaid by way of deductions of the Respondent's salary at such monthly instalments.

Two months prior to expiry of the deductions, the Appellant offered the Respondent a loan facility of Tshs. 1,000,000/= from which the deductions were agreed to be Tshs. 51,100/= per each month for a period of five years.

Through the second loan, the Respondent expected the appellant to deduct the two months outstanding balance and deposit Tshs. 856,800 into the Respondent's bank account.

The Respondent alleged that the Appellant did not deposit such loan but proceeded to deduct his salary for 60 months. He further alleged that at first, he thought the Appellant credited him with Tshs. 484,200/= due to various correspondences but later realized that even such amount was not deposited to his account and thus making the deductions illegal for no loan was advanced to him.

The trial court was satisfied that indeed the respondent's claims were sufficiently proved to the extent of Tshs. 25,000,000/= as general damages, Tshs. 25,000,000/= as special damages, Tshs. 10,000,000/= as interests on the decretal sum from the date of judgment till final payments and costs of the suit.

The appellant was not satisfied with such judgment and decree hence this appeal with four grounds to the effect that;

i) The trial court entertained the suit without having jurisdiction.

ii) The trial court wrongly analyzed the evidence on record when it held that the loan of Tshs. 1,000,000/= was not fully disbursed to the respondent's account.

iii) *The trial court erred to fault the terms of the loan agreement freely entered by the parties.*

iv) *The trial court wrongly awarded the Respondent unproved/unsubstantiated and vague damages or reliefs.*

At the hearing of this appeal Mr. Wilbert Kilenzi learned advocate appeared for the appellant while the Respondent was present in person and had the legal service of Mr. Kelvin Kayaga learned advocate.

Mr. Kilenzi argued the first ground faulting the trial court to have entertained the suit without jurisdiction for the suit amount was only Tshs. 1,000,000/= which was the contractual loan amount. He referred this court to section 13 of the Civil Procedure Code which requires the suit to commence at the lowest grade of the court.

The learned advocate further argued that the claims of specific damages at the tune of Tshs. 35,000,000/= was without particulars just for making window shopping for justice to procure a favourable court irrespective of pecuniary jurisdiction.

Responding on this first ground, Mr. Kelvin Kayaga learned advocate argued that jurisdiction of the court is ascertained from the pleadings and not evidence and that the plaint pleaded the amount which was within the pecuniary jurisdiction of the trial court.

I will determine this ground before dwelling into the rest grounds. First of all, this ground was not raised at the trial court and Mr. Kilenzi admitted as such at the hearing of this appeal.

In his opening statement on the ground he submitted;

"Admittedly this issue (jurisdiction) was not raised at the trial but it is the law that the issue of jurisdiction can be raised at any stage."

I agree with the learned advocate that jurisdictional issue as a matter of principle can be raised at any stage but I am far to grasp that the principle was made to accommodate afterthoughts. It has been a tendency of every defeated party to raise issues of jurisdiction at the appellate stage which ought to have been raised at the trial court. This tendency is aimed at frustrating decrees against them to circumvent the substantive justice entered by the lower court. It is like putting jurisdictional ground as **a fishing ground of appeal** for whoever is defeated in a suit.

Issues of jurisdiction and illegality in an application for extension of time have been in use as fishing grounds by the defeated parties against the overriding need of attaining substantive justice.

In the case of ***Yahaya Rashidi and Hamis Musa Versus Kassim Masudi and 11 others, PC Civil Appeal no. 18 of 2021*** High Court at Kigoma, I had time to speak against such tendency. I ruled;

"Before I put my pen down let me say something on the ground of illegality as sufficient ground for extension of time. It has been a tendency of advocates and their clients in each application for extension of time to plead illegality against the judgment upon which extension of time is sought to be challenged.

It has turned to be a fishing ground in every application of such nature and any appeal therefrom. I have in a number of cases questioned; since the role of an applicant in an application for extension of time is to account for each day of the delay, how do

illegality can be used to account for such delay. Is the ground of illegality there as a safeguard to those who have no any sufficient cause for delay?"

In the same way, jurisdiction has as well been turned into being a fishing ground by judgment debtors.

I find it unfair to blame and condemn the lower courts on issues which were not brought to their attention for determination. Nevertheless, I will determine the ground as it was argued by the parties before me.

On whether or not the trial court had jurisdiction to entertain this suit, I join hands with Kelvin Kayaga learned advocate that it had the requisite jurisdiction.

The learned advocate for the Appellant is confining his arguments on the issue to the contractual amount between the parties. But the claim at the trial court was not the contractual loan but the illegal deductions of the respondent's salaries and over deductions.

The respondent pleaded in the plaint that they deducted his salaries over and above the contractual period even without having been credited with the loan itself. As such he claimed special damages to the tune of Tshs. 35,000,000/=.

In the case of ***M/S Tanzania China Friendship Textile Co. Ltd Versus Our Lady of the Usambara Sisters [2006] TLR 70*** the Court of Appeal held that it is **the substantive claim** and not general damages which determines the pecuniary jurisdiction of the court.

In the instant matter the substantive claim was Tshs. 35,000,000/= which is well within the pecuniary jurisdiction of the trial court as rightly argued by Mr. Kelvin Kayaga.

The learned advocate for the appellant is thus wrong to interpret the pecuniary jurisdiction in this matter basing on the contractual loan instead of the substantive claim. The contractual loan was not the substantive claim at the trial court and thus could not be used to determine the jurisdiction of the trial court. With the herein analysis, I reject the first ground and dismiss it.

In the second ground, Mr. Wilbert Kilenzi learned advocate argued that the trial court failed to analyze properly the bank statement exhibit P3 in which some months there were no deductions to the respondent's salary as a result the trial court reached to a wrong conclusion that the deductions was made over and above the agreed period and over and above the amount which ought to be deducted in accordance to the agreement.

He pointed out fifteen months in the years 2009, 2010, 2011 and 2014 in which no deductions were made. He concluded that the deductions were made to only 57 months which is only four years and nine months as against the findings of the trial court that the deductions were made for six years.

The learned advocate further argued that even if there would have been over deductions, such claims should have been directed against the respondent's employer who was making such deductions.

He finally argued that during trial the respondent's bank statement from September, 2009 to November 12th, 2011 was missing which was very vital to establish the disbursed loan and the deductions.

The learned advocate however admitted that there was no documentary evidence to show that the whole amount of Tshs. 1,000,000/= was disbursed to the respondent's bank account but maintained that the respondent had admitted in the plaint to have received Tshs. 484,200/=.

He later changed his stand and argued that the whole agreed loan was disbursed and that the missing bank statement of the respondent could have reflected the truth but the respondent neglected to bring it.

Mr. Kelvin Kayaga in responding to the second ground submitted that it was the duty of the appellant to prove that she disbursed the whole agreed loan of Tshs. 1,000,000/= to the respondent's account but the appellant did not discharge such duty.

He argued that apart from the respondent's bank statement, the appellant could have brought deposit documents to prove that they really deposited to the respondent such loan but they did not do so.

Mr. Kayaga further argued that the deductions of the respondent's salary was being done by the appellant's agent, the deductions was made without the deposition of the loan itself and the deductions was done against the agreed terms whereas the parties agreed for deductions of Tshs. 51,000/= per month but the deductions were at times done at Tshs. 71,000/= which resulted into hardening the respondent's life.

About admission by the respondent in the plaint that he received Tshs. 484,200/= as part of the loan, the learned advocate argued that the same plaint shows that upon due diligence, the respondent realized that even such amount was not deposited at all.

On this ground, I find that we don't have evidence on record to establish whether the appellant really credited the respondent's account with Tshs. 1,000,000/= as an agreed loan in top up of the first discharged loan.

The appellant's advocate himself was chewing words on the matter. At sometimes admitting that they have no evidence to prove that they deposited such amount to the respondent and at times changed arguing that they deposited. He could not however point out any specific document showing that such loan was really disbursed.

I therefore agree with Mr. Kayaga that indeed the appellant having entered into the loan agreement with the respondent started to deduct the respondent's salary without having given him the loan itself.

Even the Tshs. 484,200/= which the respondent indicated to admit in the plaint were not paid to him. He himself made it clear that at first, he thought that he was given such amount due to the appellant's email correspondences but upon due search he realized that even that amount was not given to him. That did not only come through evidence during trial but it is as well born on record as per paragraph 10 of the Plaint in which the Respondent pleaded on 4th March, 2020 he realized that the Appellant had not deposited to him any amount of the agreed loan.

Mr. Kilenzi admitted that exhibit P9 which is the account statement within the appellant's office is not a conclusive proof that Tshs. 1,000,000/= was really disbursed to the respondent's account because it contradicts the said "admitted fact" of Tshs. 484,200/= and the fact that since the said loan was a top up, no way could the whole loan of Tshs. 1,000,000/= be credited to the respondent as there was to be deductions of two months to clear the first loan. Exhibit P9 is not deposit evidence of the loan amount into the

Respondent's account. It is an account statement managed by the Appellant herself within her office without any connectivity to the Respondent's bank account for transferring any fund.

In that respect, I conclude that the appellant conned the respondent by instigating him to enter into a loan facility agreement and used the same to deduct the respondent's salary without disbursing the loan itself. Therefore, all the deducted amount for 57 months as argued by the appellant's advocate or 60 months as argued by the respondent's advocate were illegally obtained by the appellant through deceitful means. Such amount forms specific damages suffered by the Respondent to have his salary deducted and consumed by the Appellant without any justifiable cause.

The appellant's own witness DW2 at page 51 of the typed proceedings stated on oath that they deducted from the respondent a total of Tshs. 3,148,600/= which was even more and above the amount ought to have been deducted even if the loan could have been fully disbursed. The witness stated;

> *". . . . Tshs. 3,148,600/= that is the amount Letshego has been taken to the plaintiff, they took more than they should have."*

In that respect, I rule out that the trial court properly analyzed the evidence on record but wrongly reached to its conclusion regarding the special damages. The special damages which was dully proved was Tshs. 3,148,600/= as herein above stated which was taken from the respondent fraudulently and not Tshs. 25,000,000/= which was decreed. I therefore substitute the decree of the trial court on the special damages from Tshs. 25,000,000/= to only Tshs. 3,148,600/=.

The second ground is thus partly allowed only to the extent of the amount of the special damages.

On the 3rd ground of appeal, Mr. Kilenzi argued that the trial magistrate wrongly interfered the terms of the contract by questioning why a loan of Tshs. 1,000,000/= could be repaid at Tshs. 3,000,000/= without considering that the long the period of the loan, the huge the interest thereof.

Mr. Kayaga on his part disputed this ground and submitted that the findings of the trial court did not in any way pronounce whether or not the contract was fair. Instead, the trial court considered the contract as a valid one upon which the parties were bound.

I think I am bound to agree with Mr. Kayaga that the trial court did not make any determination on the fairness or otherwise of the loan contract. The faulted part of the trial court judgment is paragraph one at page 14 in which the trial court stated;

> *"Plaintiff has borrowed Tzs 1,000,000/= but is required to repay 2,066,000/= (3,066,000 – 1,000,000 = 2,066,000/=). So the plaintiff has been deducted twice what he borrowed. Admittedly exhibit P3 showed that plaintiff is required be deducted 3,066,000/= for five years."*

Throughout such quotation, there is no finding faulting the loan contract as being unfair. The trial court merely restated the facts that the respondent in accordance to exhibit P3 was to repay twice of what he borrowed. The 3rd ground is thus without any merits and accordingly dismissed.

On the fourth ground, Mr. Kilenzi learned advocate argued that the trial court awarded unproved claims by drawing adverse inference against the appellant that she was behind the failure of the respondent to procure his complete set of the bank statement. He thus argued that the awarded special damages of Tshs. 25,000,000/= were not strictly proved, general damages of Tshs. 25,000,000/= were awarded without assigning reasons, and Tshs. 10,000,000/= were awarded without having been pleaded. He thus prayed for this appeal to be allowed with costs.

On this ground, first and foremost, it is my firm findings that the respondent's efforts to procure the complete set of his bank statement was just a good intention to have justice been dully done. But his failure did not waive the obligations of the appellant to prove that she really credited the respondent with the agreed loan.

The respondent in establishing that he had a loan agreement with the appellant through which the appellant ought to have credited his account with Tshs. 1,000,000/= as a top up loan but that such amount was not effected despite of the contract having been dully executed, was enough.

It was the duty of the appellant to prove that she paid the respondent such amount. It was not the respondent to prove by documents that he was not paid but it was the appellant to bring tangible evidence be it documentary or otherwise that she effected the agreed loan into the respondent's bank account. To rule otherwise would be very dangerous in the administration of civil justice particularly on these financial transactions because it might open the pandora box for financial institutions to con their clients and purport to have no duty of proving that the agreed loan was really disbursed to the respective client.

I wonder as rightly argued by Mr. Kayaga, if the respondent's bank statement was not released by the bank to the respondent, why didn't the appellant bring her own documents including the deposit slips to establish such deposits. Failure of the Appellant to bring evidence establishing that she disbursed the stated loan to the Respondent's bank account calls for drawing of an adverse inference against her in that she did not disburse the stated loan. I accordingly draw such inference.

About the decreed amounts, I agree with Mr. Kilenzi that special damages were awarded to the extent not proved. I have already determined the due special damages supra as against the decreed one by the trial court.

I also agree with him that the awarded Tshs. 10,000,000/= was not pleaded and Mr. Kayaga admitted that such amount ought to be vacated although he pressed for interest rate of 10% of the decretal sum from the date of judgment to the date of full payment.

I therefore quash such award and in lieu thereof I order the appellant to pay the respondent 7% of the special damages decreed herein from the date of the trial court's judgment to the date of full payment.

In regard to general damages, I find that the trial court justifiably awarded Tshs. 25,000,000/= to the respondent. The trial court gave the reasons behind such award such as economic instability of the respondent, emotional distress, loss of income, waste of time in tracking the loan and pains suffered.

I can only add that it was very bad for the appellant to con her customer and deduct his salaries on ungiven loan. Such habit even attracted punitive damages but since the general damages was awarded to the tune

of Tshs. 25,000,000/= that is enough to let the appellant know that conning clients does not pay. She utilized the Respondent's money for many years without any justification thereby denying the Respondent to enjoy his salary in full. He deserves to be compensated for the loss of use of his money by general damages herein above decreed. I therefore dismiss the fourth ground on the aspect of general damages.

That having done, this appeal is partly allowed to the extent herein above explained. Even though the appellant is condemned costs of this appeal to the respondent due the fact that she was the causative of all the problems pertaining to this matter.

Right of appeal is full explained.

It is so ordered.

MATUMA

JUDGE

16/11/2023

Order; Judgment delivered in the presence of the respondent and his advocate Akram Magoti holding brief of advocate Kelvin Kayaga for the respondent and in the absence of the appellant. Right of appeal explained.

MATUMA

JUDGE

16/11/2023